

STATE OF MICHIGAN
COURT OF APPEALS

LORIE ALLEN,

Plaintiff-Appellant,

v

CHRYSLER GROUP LLC, f/k/a
DAIMLERCHRYSLER CORPORATION, and
MOUNT CLEMENS DODGE, INC.,

Defendants-Appellees.

UNPUBLISHED

March 23, 2010

No. 284687

Macomb Circuit Court

LC No. 2007-000745-NZ

Before: HOEKSTRA, P.J., and BECKERING and SHAPIRO, JJ.

HOEKSTRA, P.J., (*dissenting.*)

Because I conclude that the trial court did not abuse its discretion in dismissing plaintiff's claims for failure to preserve evidence, I respectfully dissent.

In this case, the trial court held:

In the instant matter, plaintiff had not only initiated litigation but was also aware—as evidenced by the repeated representations of her counsel that the vehicle was available for inspection—of defendants' request to inspect the Durango before she sold it. Inasmuch as every claim in this lawsuit challenges the ongoing condition of the vehicle, plaintiff clearly knew or should have known that the condition of the Durango would be material to this litigation. Plaintiff also should have been aware and had been put on actual notice of the need to preserve the vehicle in order to provide defendants' with an opportunity to inspect it. An inspection was necessary to give defendants the opportunity to obtain evidence to defend against plaintiff's allegations. Instead, by trading the vehicle in without providing any notice to defendants, plaintiff has deprived defendants of the opportunity to rebut her claim that the Durango was defective and remained defective despite numerous repair opportunities.

Significantly, plaintiff's lemon law letter, seeking repair of the vehicle, does not constitute notice of rejection or revocation. Notwithstanding, plaintiff's actions in trading the vehicle in (i.e., selling it) was an exercise of ownership that was wrongful against defendants. MCL 440.2602(2)(a). Moreover, the act of trading the vehicle in—without providing *any* notice to defendants—unjustly deprived defendants of the return of the vehicle or its value. MCL 440.2602(2)(b), 444.2603, 440.2604 and 440.2706.

Permitting plaintiff to proffer evidence of the alleged defective condition of the Durango, when plaintiff's actions have precluded defendant Chrysler from having the opportunity to refute such a claim, would create an injustice. There is no meaningful lesser sanction other than prohibiting plaintiff from presenting any evidence as to the condition of the vehicle that will remedy the harm caused by plaintiff's failure to preserve the Durango. Otherwise, plaintiff would be free to testify the vehicle was defective but defendant Chrysler would be prevented from obtaining and presenting evidence to contradict such testimony.

Inasmuch as all of plaintiff's remaining claims require proof that the Durango was and/or remained defective, preclusion of evidence of the alleged defective condition of the vehicle necessarily mandates dismissal of the remainder of plaintiff's complaint. While the result is harsh, this consequence is necessitated by plaintiff's own actions, which would otherwise deprive defendant Chrysler of a fair trial.

This Court reviews the sanctions imposed by a trial court for a party's failure to preserve evidence for an abuse of discretion. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). A trial court abuses its discretion when it fails to select a reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This standard recognizes that, in certain circumstances, there is no single correct outcome, and that as long as the trial court chooses a principled outcome, this Court must defer to the trial court's decision. *Id.*

The factual basis for the sanction is not in dispute. Plaintiff knew or should have known that she had the obligation to preserve the vehicle by keeping it in her possession. Yet, acting unilaterally and directly contrary to that obligation, she sold the vehicle. The trial court found that plaintiff's actions compromised defendants' right to a fair inspection of the vehicle and ordered dismissal. I do not find the trial court's decision to be outside the range of reasonable and principled outcomes. Even if, as the majority argues, the vehicle could be subsequently located and inspected, the transfer of possession of the vehicle to third parties naturally raises numerous issues regarding the credibility and reliability of a subsequent inspection. Plaintiff had the obligation to maintain possession of the vehicle until an inspection was completed. Her action in selling the vehicle compromised the integrity of the legal action that she initiated. The

trial court's decision that plaintiff's actions warranted dismissal was easily within the range of principled outcomes. I would affirm.¹

/s/ Joel P. Hoekstra

¹ In its opinion and order, the trial court only dismissed as a sanction those claims against DaimlerChrysler Corporation that withstood the substantive challenges raised by defendants in their joint motion for summary disposition. However, as recognized by the parties at oral arguments, the sanction imposed by the trial court would require dismissal of all of plaintiff's claims against defendants. Consequently, having determined that the sanction imposed by the trial court was not abuse of discretion, I do not reach the merits of plaintiff's remaining arguments.